IN THE

Supreme Court of the United States

October Term, 1956

No. 92

RUDOLPH SCHWARE,

Petitioner

v.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO,

Respondent

RESPONDENT'S BRIEF

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On Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF OF RESPONDENT

The respondent has no objection to the portions of the Brief of Petitioner entitled Opinion Below and Jurisdiction. With respect to the portion of the Brief, entitled, Constitutional, Statutory and Regulatory Provisions Involved, the respondent desires to cite also the following statutes:

United States Constitution, Amendment XIV, Sec. 1, Clause 2

N. M. S. (1953 Comp.) § 18-1-8

Neutrality Act of 1816, 18 U.S.C. § 959(a)

N.M.S. (1953 Comp.) § 18-1-9

Rules Governing Admission to the Bar of the State of New Mexico (I, III)

Communist Control Act. 60 Stat. 775, 50 U.S.C.A. 841

Internal Security Act, 64 Stat. 987, 50 U.S.C.A. 781, (1), (9), (15)

and the pertinent text of the statutes is placed in the Appendix of this Brief.

The respondent is dissatisfied with petitioner's statements required by Rule 40(d) and (e) and therefore makes the following statements under these provisions of the Rule.

Questions Presented for Review

1. Is it a denial of due process for the Supreme Court of the New Mexico on plenary review to adhere to the finding of its Board of Bar Examiners that the petitioner "has failed to satisfy the Board as to requisite moral character for admission to the Bar of New Mexico" which finding was made upon petitioner's application for admission to the Bar and evidence introduced by the petitioner only, which included the following:

(a) evidence from which good character could be inferred:

(b) history of membership and active and knowing participation in the work of the Communist party admittedly from 1932 to 1940 at applicant's ages of 18 to 26,

(c) repeated use of two different aliases during the period of his Communist Party activity,

(d) arrests, without convictions, on an unascertained number of occasions,

(e) discrepancies and omissions in the petitioner's application and testimony?.

2. Is it a denial of due process for the Supreme Court of New Mexico so to adhere to such finding of its Board of Bar Examiners where the Board, upon assurances to informants that it would not disclose the same, had obtained confidential information concerning the petitioner, the nature of which was not disclosed to the petitioner; but where *on the other hand*, this confidential information (a) was *not* a basis of the Board's decision, and (b) was *not* considered by the members of the New Mexico Supreme Court who joined in the decision here reviewed?

Statement of the Case

A. Procedural History of the Case

The respondent Board has the function of examining "candidates for admission to the bar [of New Mexico] as to their qualifications, and to recommend such as fulfil the same to the Supreme Court for admission to practice." (N.M.S. (1953 Comp.) s. 18-1-18). Among the required qualifications for admission is that the candidate be "of good moral character" (Rule I (1), Rules Governing Admission to the Bar of the State of New Mexico.) The Board is authorized to decline to permit any applicant to take the bar examination "when not satisfied of his good moral character." (*ibid.* Rule III(7)) The function of the board is recommendatory only. Actual admission to practice in

the case of successful applicants occurs on the approval of the Supreme Court of the Board's recommendation (N.M.S. (1953 Comp.) s. 18-1-18). In cases where an application is rejected, the action of the Board may be reviewed on petition to the State Supreme Court. That court has plenary jurisdiction to review the board's decision and upon such review the court is not limited by appellate rules but considers the matter originally. Schware v. Board of Bar Examiners, 60 N.M., 304; 291 P. (2) 607).

In the course of making its examination of the qualifications of applicants, it has been the practice of the respondent Board to make written inquiries concerning each applicant. (R. 105) Permission to make these inquiries is required of each applicant upon the explicit understanding that the applicant will not be entitled to receive a copy of the report or to know its contents. (R. 105) Inquiries are made and answers obtained thereto upon the express assurance given to informants that the respondent will hold them in strict confidence. (R. 92, par. 10) This procedure was followed in the present case. (R. 92, 105)

The petitioner attended the University of New Mexico College of Law from September 1950 to January 1954 at which time he obtained his Bachelor of Laws degree. (R. 96) Within a few weeks after he had entered law school, he spoke to the Dean of the Law School and told the Dean of his past affiliation with the Communist Party. (R. 29) The Dean then told him not to tell anybody about having been a member of the Party. (R. 29) The petitioner knew that his former membership might affect his ability to be admitted to the Bar and expected that a hearing would have to be held by the respondent when he applied for admission. (R. 42, 43)

In December 1953 the petitioner applied for leave to

take the bar examination on February 29, 1954. (R. 94) His application forms a part of the record here. (R. 94-105) He was given notice to appear for the examination and when he did so was interviewed by the respondent Board.[1] (R. 2, par 5; 3, par 10; 8) Subsequently, petitioner obtained counsel who asked for a hearing. (R. 2) This hearing was held July 16, 1954, at Albuquerque. (R. 7)

A transcript of this hearing was kept and is a part of the record. (R. 7-89) Evidence was introduced by the petitioner, his wife, and certain character witnesses. In addition, two sets of documents consisting of (1) letters sent by the petitioner in the period March 16, 1944 to June 30, 1944, while he was overseas in the military service (R. 62-84) and, (2) letters of recommendation as to the petitioner's good character. (R. 85-89) No evidence was introduced by the respondent.

At the outset of this hearing, petitioner's counsel asked to be given any data, and the names of any witnesses, which

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[1] In the Brief of Petitioner at p. 58, counsel states that

> ". . . . the Board below originally agreed to permit Schware to take the bar examination when it had before it the record of arrests and aliases which he had presented to the Board in his application for a character report. It was only after they received the derogatory information against him that they determined that he was ineligible."

This statement is utterly without support in the record and is contrary to fact. The notice to report for examination was, no doubt, sent out as a matter of routine in advance of the meeting of the Board of Bar Examiners who come from all over New Mexico to Santa Fe to conduct the bar examinations. The information in the files of the several applicants was in all probability not considered by the Board of Bar Examiners until they met a day or two in advance of the examinations and some time after the notice to report for examination had been sent to applicants.

had been obtained against the petitioner. (R. 8,9) He was advised that an investigation had been made of a confidential nature and with the written consent of the petitioner. (R. 9,10) The respondent board further advised the petitioner that its original decision to decline to permit him to take the bar examination was not motivated by any such information. (R. 9,11)

At the close of the hearing, the respondent board unanimously affirmed its former action on the petitioner's application. (R. 3, 4, par. 13) In reaching this determination the respondent did not do so on the basis of confidential information the bases of its decision being found in the facts disclosed by the petitioner himself.[1] (R. 92, par. 10, and 93, par. 4)

Following the decision of the respondent Board, the petitioner filed a Petition for Review in the Supreme Court of New Mexico setting up some twelve grounds of objection, including the due process clause of the Fourteenth Amendment. (R. 1-6) Due Response was made to the Petition which admitted the plenary power of the State Supreme Court to review the respondent Board's action. (R. 90-94) In the course of its opinion the Court determined that it had plenary power of review, and that such review was not limited by appellate rules but that the cause should be considered originally. (R. 106) The Court further assumed that the right to apply for membership in the legal profession was a species of property as that word is used in

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[1] There is a misprint on page 92 of the record, beginning at Line 22. The sentence beginning on that line should read:

"Further that the respondent does not reach a decision upon applications for admission to the State Bar on the basis of such confidential information so obtained and did not do so in the case of the petitioner in this cause; . . . ."

the Fourteenth Amendment. (R. 106-107) The universal rule of law that one applying for admission to practice "places his good moral character in issue and bears the burden of proof as to that issue" was noted and applied. (R. 108) After a detailed examination of the record the Court concluded that the petitioner had not sustained this burden and had not "proved to us that he is a man of good moral character." (R. 126) Based upon this conclusion it was ordered that petitioner's application to take the bar examination of the State of New Mexico be denied. (R. 126)

In the course of its Opinion, the Supreme Court of New Mexico made clear that none of the Judges who joined in the majority opinion had looked at the data obtained upon the confidential investigation made in the petitioner's case, although the single judge who dissented had done so. (R. 110, 111)

Petition for certiorari was filed May 17, 1956, and granted October 8, 1956.

B. Summary of the Evidence

The petitioner was born in January 1914 and at the date of his application was 39 years of age. (R. 95) His father was a needles trade worker, a poor man (R. 16), a socialist (R. 16) and an atheist. (R. 42) The petitioner began to work at the age of nine and continued to work part time while at school. (R. 17, 18) He attended DeWitt Clinton High School in the Bronx, New York from 1928 to 1932. (R. 96) While there, in 1932 he joined the Young Communist League after an occurrence in which the Communist students had impressed him in refusing to disband a club upon the demand of the school principal. (R. 18, 19) In connection with this occurrence, the petitioner was sus-

pended from school approximately three days (R. 104, par. 16(1))

The petitioner joined the Communist Party in 1934 at his age of 20. (R. 19) In September to November 1933, he was employed in a pocketbook factory in Middletown, New York. (R. 100 par. A) For the first time (R. 20) he used an alias, adopting the name of Rudolph DeCaprio. (R. 100) In his written application, he stated that he did so because he desired to organize the employees, a large number of whom were Italian, into a union and that after the workers were organized into a union he returned to New York City and resumed the use of his real name. (R. 100, par A) At the hearing in February 1954, he appears to have re-iterated this statement (R. 34) At the hearing in July 1954, he stated first that he had adopted the Italian name solely to gain employment at a factory in Gloversville, New York. (R. 19. 20) When his attention was called to this discrepancy, he stated that his motive was a combination of both getting the job and organizing the Italian workers. (R. 34-35)

From February 1934 to February 1937, petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was a shipyard worker, longshoreman, warehouseman and seaman. (R. 101, par B, and 102, par. B 6-8) During the entire period of his residence in California he used the alias Rudolph DeCaprio (R. 100, par. A) This was, he testified, solely to obtain employment since he never did find a Jewish person working in a shipyard. (R. 20, 21).

In the Communist Party, the petitioner used the names Rudy de Caprio or Joe Fliori, he does not recall which. (R. 38) In 1934, he was arrested "on several oc-

casions" or "twice" for criminal syndicalism during the maritime strike in California. (R. 103, 21) He had been working under the name Rudy de Caprio in the shipyard (R. 21, 102,) but when arrested used the name Joe Fliori (or Joe Fliari). (R. 22, 100) This name or names were assumed to give the police. (R. 22) He derived no monetary benefit as a result of his use of the name. (R. 22)

In February 1937 the petitioner's father died and he returned to New York. (R. 25) He dropped out of the Communist Party and resumed the use of his correct name. (R. 25) For some months he had transient employment apparently in New York, Chicago, Rio Hondo, Texas, and Indianapolis. (R. 101, 102, 25) From March 1938 to February 1940 he was Secretary of Wayne County Workers Alliance and subsequently until June 1940 he was State Secretary of the Detroit Workers Alliance, both positions being in Detroit. (R. 25, 26, 102, 103.) During the period November 1937 to June 1940, he lived in Detroit but could recall no residence address there. (R. 101)

While in Detroit on February 6, 1940, petitioner was arrested under an indictment for violation of the Neutrality Act (18 U. S. C. § 959(a)) (R. 104) This was a result of his obtaining recruits to fight Franco in Spain. (R. 23) His activity in recruiting for the Abraham Lincoln Brigade had been part of his activity on behalf of the Communist Party in 1937 or 1938. (R. 35) The charges under which he was arrested were terminated by nolle prosequi (R. 105, 23) Petitioner testified that at the time of his activity he did not know he was breaking the law. (R. 23, 24)

The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (R. 24)

In the latter part of 1940 the applicant left the Communist Party. (R. 24, 26) His break with the Communist principles was gradual and he cannot put his finger on a particular date. (R. 51, 52) It may have been as late as 1944 or after he went into the army when he finally repudiated the principles of the Party. (R. 51, 52) During the period of his membership he was active in the work of the Party (R. 34, 35, 52, 53) and understood its objectives. (R. 45, 46, 47, 49) His actions in connection with his arrests in San Pedro and Detroit were governed largely by instructions he had received from the Party. (R. 25) The petitioner testified that he left the Party and subsequently abandoned its principles through disillusionment and because of a feeling that the party officers were interested primarily in power. (R. 25, 26, 33)

Petitioner was inducted into the army in January 1943 (R. 101) or January 1944 (R. 27) and was honorably discharged in 1946. (R. 103) While in the military service, he married and at the time of the hearing had two children. (R. 18, 31) Nine letters which he wrote to his wife from March to June 1944 while in the service were offered as corroborative of his claim to have been converted from Communism. (R. 62, 84) He has become a member of the synagogue in Albuquerque and its Rabbi testified that the petitioner is of good moral character. (R. 55, 56) Some seventeen letters from law professors and students and business associates were introduced into evidence stating that petitioner is of good moral character. (R. 84-89) These letters appear all to be from persons who has known him during his years at Law School in Albuquerque. (R. 84-89) While in law school, petitioner established an anonymous scholarship of $50.00 a year to be given to needy students, which he has continued and hopes to continue indefinitely. (R. 31, 32, 57)

In response to questions in the petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age (R. 95) petitioner stated that he had lived at ten different residences in six states in the period March 1934 to January 1943. (R. 101) Of these he specified only one beside his father's residence, where he had been very briefly, although partially specifying another. (R. 101) In response to a question requiring detailed employment information since age 16 (R. 97) he responded with somewhat less than specific information. (R. 101-103)

SUMMARY OF ARGUMENT

A. Claimed Lack of Substantive Due Process

The right of a court and of a state to examine applicants for admission to the practice of law as to moral character as well as professional fitness is an ancient and reasonable one and must be considered a part of the due process of law. In accordance with a practice universal among the several states, New Mexico requires that a candidate for admission discharge the burden of proof by satisfying its Board of Law Examiners of his good moral character.

There cannot be a direct inspection of moral character. Any conclusion upon it can be only a judgment based upon a study of the past and present conduct of the subject of the examination aided perhaps by the impressions of others who have observed his conduct. The due process of law requires that such an inquiry be reasonably made and that the conclusions drawn be rational and material. Being rational, the conclusion should be based upon fair inference and logical deduction. Being material, the conclusion should relate to the aims of the inquest — moral fitness to practice

law. The respondent recognizes fully that it would be a distortion of the purpose of such examination of moral character, and a denial of due process, that such inquiry be used as a method of ensuring the admission to practice of only the conventional, the conformist, the orthodox.

The respondent Board is charged by the State of New Mexico with making the inquiry and reaching a decision as to moral character required by its laws. The Board consists of five experienced, and we may say, outstanding, lawyers. The due process of law is understood and valued no less in New Mexico than in the District of Columbia. The respondent Board was charged with the responsibility of finding a fact, or more accurately a recommendation as to a finding of fact, on an issue of patent gravity. Its members observed the demeanor of the petitioner as a witness in his own behalf. They remained unsatisfied of his good moral character.

Upon a complete review as a matter within its original jurisdiction, the Supreme Court of New Mexico likewise found that it did not hold the conviction of the petitioner's "good moral character for the purpose of being given the office of attorney." (R. 126)

The decision below finds warrant in the petitioner's own evidence. He has been an active and knowing member of the Communist Party according to his account from the age of 20 to the age of 26, and admits possibly having adhered to its principles until his age of 30. His disavowal of present membership and claim of conversion was for the respondent Board and for the Supreme Court of New Mexico to evaluate. He has concealed his identity over a period of years under two aliases without, we submit, an innocent explanation. He has been arrested three or more times in

circumstances where adverse inferences as to moral character are reasonable and probable. There exist in his account of himself discrepancies from which the respondent Board and the Supreme Court of New Mexico could, and quite logically, did draw adverse inferences.

The due process of law in this cause required no more nor less than a reasonable inquiry into and a fair decision upon the petitioners "good moral character." New Mexico has not denied the petitioner due process by remaining unpersuaded by the evidence which he presented.

B. Claimed Lack of Procedural Due Process

The refusal of the respondent Board to disclose to the petitioner confidential information obtained concerning him was not a denial of due process. Such information was obtained with the petitioner's knowledge and consent. (R. 105, 10) It was obtained from informants on the respondent Board's explicit assurance that it would not be disclosed but would be held in strict confidence by the Board. (R. 92)

The original decision of the Board in the Petitioner's case was not motivated by this confidential information. (R. 9, 11) The second decision was not reached on the basis of such information but was based upon facts disclosed by the petitioner himself. (R. 92) The Supreme Court of New Mexico in reaching its decision did not even look at this confidential information. (R. 110, 111)

It is not a denial of due process to fail to disclose confidential information which is *not* a basis of decision. The right of cross-examination or confrontation does not extend to evidence *not* considered by the finders of fact.

ARGUMENT

POINT I

The Supreme Court of New Mexico did not deny the petitioner substantive due process of law by refusing to find that he had satisfied the burden of proving his good moral character.

A. Introduction

From the most ancient times, courts have supervised the admission of practitioners of law so as to ensure not only adequacy of legal learning but excellence of moral character.

> *Starrs, Considerations on Determination of Good Moral Character*
>
> 18 U. of Det. L. J., 195, 202
>
> "If then by common consent in the ninth century a lawyer should be 'mild, pacific, fearing God and loving justice' (the entire idea of which could just as well be translated 'of good moral character') might it not be reasonable to conclude that there was a general recognition, 1150 years ago, that the public weal demanded a Bar composed of men of probity."
>
> *St. 4 Henry IV, c. 18* (1402)
>
> ". . . . . it is ordained and stablished that all Attornies shall be examined by the Justice, and by their Discretions their names put in the Roll and *they that be good and vertuous and of good fame* shall be received and sworn. . . ."

The requirement of good moral character has existed in the courts of all the states from the earliest times.

Re Stepsay, 15 Cal. (2) 71; 98 P. (2) 489, 490

"There is, of course, no question that one of the prerequisites to practice law in this state, and in all other jurisdictions so far as we are advised is the possession on the part of the applicant of a good moral character."

In re Hyra, 15 N. J. 252; 10 A. (2) 609

"From the earliest days in this state it has been a rule of court that 'no person (shall) be admitted to such examination (to practice as an attorney at law) unless . . . he shall be of good moral character.' This rule is not peculiar to New Jersey; it is a universal requirement." (per Vanderbilt C. J. dissenting.)

Re Crum, 103 Or. 296; 204 P. 948, 950

"Evidence that satisfies the court of the good moral character of an applicant for admission to the bar is required in all jurisdictions."

Moreover, it appears to be a universal requirement of long standing that the burden of proof to establish good moral character is upon the applicant for admission to the bar.

Re Garland, 219 Cal. 661; 28 P. (2) 354

Rosencranz v. Tidrington, 193 Ind. 472; 141 N. E. 58

Re Weinstein, 150 Or. 1; 42 P. (2) 744

Annotation, 28 A. L. R. 1140, 1142.

The law of New Mexico is in accordance with the foregoing summary of the general law. It requires as an essential qualification that an applicant for admission be "of good moral character" (Rule I(1) of Rules Governing

Admission to the Bar of the State of New Mexico.) The burden of satisfying the Board of Bar Examiners of the possession of this qualification is on the applicant for admission and "the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character." (*ibid*, Rule III(7)) *Schware v. Board of Bar Examiners*, 60 N. M. 304, 307; 291 P. (2) 607.

The requirement of "good moral character," like many concepts of the law, might appear to be vague and inexact. (See *Petition of R*_____, 56 F.S. 969, (D.C.Mass.)) However, in its practical application to the admission of attorneys to practice law we see no real difficulty. The context of the requirement compels the conclusion that the nature of "good moral character" be related to its purpose. Its purpose is to ensure that unprincipled persons will not be licensed in a profession where there is grave risk of injury to the public and to the administration of justice from the lack of such character. More specifically, that none will be admitted to practice who are likely to offend the ethical standards of the profession and of the courts as formulated in New Mexico's statutory statement of the duties of an attorney (N.M. St. (1953 Comp.) s. 18-1-9) and in the Canons. So understood, there would appear to be no basis whatever for an attack on constitutional grounds on the rule requiring possession of good moral character. The power of a state to regulate the admission of attorneys to practice law in its courts and to make reasonable requirements touching such admission is too clear for dispute. *Re Summers*, 325 U. S. 561, 570, 571); and the propriety of the requirement that an applicant be of good moral character cannot be challenged. We do not understand that, as such, it is being challenged by the petitioner in this cause.

On the other hand, a state may not under the guise of this rule, or any other rule, exact of an applicant a qualification not reasonably related to the proper purposes to be served by the regulation. This was true under Article I, Section 10 of the Constitution prior to the adoption of the Fourteenth Amendment. In *Cummings. v. Missouri,* 4 Wall. 277, this court held unconstitutional as a bill of attainder a requirement for the practice of certain professions in Missouri that the practitioner make oath to the effect that he had not adhered to the Southern cause in the Civil War. In doing so, the Court pointed out that there was "no possible relation" between the claimed disqualifying actions and the petitioners' "fitness for (their) pursuits and professions." The power of the Federal government is subject to a like limitation under Article I, section 9. *Ex part Garland,* 4 Wall 333. We take it as obvious, and it was so assumed by the New Mexico Supreme Court in this cause, that this prohibition against irrational state action is further sanctioned by the Fourteenth Amendment. (See *Schware v. Board of Bar Examiners,* 60 N.M. 304, 306; 291 P. (2) 607.) *Re Summers,* 325 U.S. 561, 570, 571; *Barsky v. Board of Regents,* 347 U. S. 442.

The respondent freely admits that a construction or application of the words "good moral character" which embraced the sense of conformity in religious, political or social ideas would offend the foregoing rules of unconsitutionality. Mere unorthodoxy in any of these fields does not as a matter of fair and logical inference, negative "good moral character," and therefore has no disqualifying relation relevant to the purposes of that requirement. The respondent Board and the Supreme Court of New Mexico, have at all times fully recognized this principle. The Court and its Board of Bar Examiners value the heterogeneity of

opinion and association which forms so characteristic and important part of the American way of life to the same degree as lawyers elsewhere in the United States. There has not been in the present case any thought of departing from these cherished principles.

What has occurred is an investigation, in accordance with the due process of the law of New Mexico (and of the other states of this country), of the moral character of an applicant for admission to the Bar. The subject here under review specifically is whether the petitioner, as a matter of law, has satisfied the burden of proving his good moral character, within the fair meaning of the requirement of the New Mexico Rules establishing the requirements for admission to practice in its court. The New Mexico court has determined that it is not persuaded by his showing, and that it does not hold the conviction that the petitioner "is a man of good moral character for the purpose of being given the office of attorney." (60 N.M. 304, 321; R. 126) If this determination was warranted by fair deduction and logical inference from the record, the challenged decision does not violate the Fourteenth Amendment or Article I, Section 10.

A review of this determination cannot fairly be made by the method of argumentation presented by the Petitioner's Brief. The argument begins with an evaluation as overwhelming and irrefragable of the affirmative proof of good conduct which the petition introduced. Throughout its course, the argument assumes as axiomatic the truth of every assertion and of every favorable or exculpatory inference from every assertion which was made by or on behalf of the petitioner. Considered substantively, the petitioner's argument places the burden of proof upon the respondent Board, exactly contrary to the correct rule of

law. Moreover, the argument for the petitioner purports to inspect and reject seriatim the several evidentiary grounds upon which the Court and the respondent Board relied for their decision without regard for their cumulative and mutually corroborative effect. In the words of Mr. Justice Holmes, petitioner would "break one by one the sticks which were relied upon only when bound together in a fagot." *Collins v. Greenfield*, 173 Mass. 78, 81; 51 N. E. 454.

The inspection of moral character cannot be a matter of objective proof. As the Supreme Court of New Mexico put it, "Character cannot be laid upon a table." (R. 109, 60 N.M. 304, 307.) A judgment as to character must be based on a review of information concerning behavior whether directly observed, disclosed by the subject himself, or related by others. The question in the present case then is simply this: As a matter of rational deduction does the evidence concerning the petitioner's past conduct require the conclusion that he has established his good moral character *as a matter of law* thereby requiring the conviction that "he is a man of good moral character for the purpose of being given the office of attorney?" Unless the answer to this question is in the affirmative, petitioner must fail. For, if an adverse decision be logically permissible, we have in the challenged decision no violation of due process. This court, we submit, should not substitute its judgment for that of New Mexico on issuable facts.

B. It was not a denial of due process to decline to give decisive effect to the evidence tending to show petitioner's good moral character.

The petitioner has stated in detail (Brief, 8-10) the affirmative proof which he introduced tending to show his good moral character. This consisted of proof of creditable

acts, religious conviction and written and oral recommendations as to his character. The latter were all by persons who had known the petitioner only since 1950 while he was attending law school in Albuquerque. The petitioner asserts that this evidence was not considered by the Court below. (Brief, 19)

There is nothing in the record to warrant such an assertion. The claim that this evidence was not considered can only mean that the petitioner considers that it is entitled to conclusive effect and that failure to give it this effect amounted to disregarding it. We know of no rule of law or reason that supports this claim. As we have already noted, the burden of persuasion was on the petitioner. If we are correct in our contention that there was evidence from which lack of good moral character was properly inferrable, there is no basis whatever for the claim that the evidence tending to show good character compelled an inference of good moral character. The evaluation of this evidence was for the respondent Board in the first instance and ultimately for the Supreme Court of New Mexico. Even in the case of uncontradicted testimony directly on an issue, the trier of fact is not bound to follow it where its credibility is rationally questionable. *Medler v. Henry*, 44 N. M. 275, 101 P. (2) 398.[1] Here, from the nature of the issue, direct proof of good moral character is not possible and the inferences to be drawn from indirect proof are obviously for the trier of fact.

Moreover, the recommendatory evidence on this issue, on fair evaluation can hardly be characterized as over-

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[1] By coincidence, the opinion in this case was written by the chairman of the respondent Board while he was on the New Mexico bench.

whelming. It relates entirely to the period while the petitioner was attending law school. Several of the letters on inspection appear to be rather guarded in language. (See e. g., letters of Heister H. Drum, R. 84; Terrance L. Dolan, R. 85; Mrs. F. C. Lefton, R. 86; Louis B. Ogden, R. 87; Ruby B. Quillen, R. 88) It is rather remarkable, we believe, that one fellow student actually refused to give petitioner such a letter. (R. 32) As a practical matter, recommendatory letters and testimony of this kind can fairly be assigned little weight to countervail adverse evidence. In *In Re Keenan*, 314 Mass. 544; 50 N. E. (2) 785, some sixty witnesses testified as to the good character and reputation of a disbarred attorney seeking reinstatement. The court observed that:

> "Evidence of character or reputation from friends or acquaintances is usually subject to discount for the complacency of witnesses who are willing to be accommodating and many of whom although sincere, may not fully appreciate the necessity of protecting the public interest."

C. The evidence of past membership in the Communist Party warranted adverse inferences on the issue of the petitioner's good moral character.

One of the bases of the respondent Board's determination that it was not satisfied as to the petitioner's good moral character was his admitted former membership in the Communist Party. (R. 84) The Supreme Court of New Mexico unquestionably based its decision in part on this same ground. (R. 124, 125) There is presented therefore the question of the constitutional tenability of an inference adverse to good moral character from the evidence in this cause touching the petitioner's membership and activities in the Party.

To recapitulate, the evidence indicated membership in the Young Communist League from 1932 to 1934 at the petitioner's ages of 18 to 20; and in the Communist Party from 1934 to 1940 at the ages of 20 to 26, with a period of claimed interruption of membership in 1937. The petitioner testified that he left the Party in 1940. He further testified that he did not finally repudiate its principles until 1944 after he went into the army, it may have been after he left. (R. 51) A letter written by the petitioner in 1944 (R. 81) was considered by the Supreme Court of New Mexico, quite rationally we submit, as reflecting doubt upon his claim to have been, by then, a disillusioned ex-Communist. (R. 123) He claims, without corroboration, that after he left the Party he went on one occasion or a couple of occasions and volunteered his services to the F. B. I. apparently to combat Communism. (R. 26)

The Supreme Court of New Mexico and the respondent Board apparently considered it a fair inference from the record that during his period of admitted Party membership the petitioner was active in the work of the Party and not merely a philosophical Marxist. He appeared to have been active in the work of the Party. (e.g., R. 34-35, 52-53) and to have understood its objectives. (R. 45-49) His actions relating to his arrests in San Pedro and Detroit were governed largely by instructions received from the Party. (R. 25)

The New Mexico Court concluded that the evidence indicated knowing adherence to the Communist Party during responsible adult years and that this along with other evidence warranted reasonable doubt of good moral character. It did not, as petitioner seems to claim, announce a principle that all ex-Communists were *ipso facto* disqualified from admission to the bar of New Mexico. We submit

that this determination by the Court was rational and fell within its constitutional power.

The inference from membership in the Communist Party to relevant dubiety in moral character seems to us entirely rational. In requiring that its attorneys be of good moral character, New Mexico includes patriotic loyalty and freedom from deception. These requirements fall fairly within the meaning of "good moral character." They are embraced in the statutory statement of the duties of an attorney (N.M.S. (1953 Comp.) s. 18-1-19) which closely follows the traditional attorney's oath in general use in this country. These characteristics are surely *relevant* to the purpose of the rules regulating the admission of attorneys to practice.

That the Communist Party offends as to both loyalty and deception, and that its members are reasonably suspect in these respects would hardly seem debatable. The Congress of the United States, after extensive investigation has made careful and decisive findings on the point:

> *Communist Control Act*, 68 Stat. 775, 50 U.S.C.A. 841 (1954)
>
> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . ."
>
> *Internal Security Act*, 64 Stat. 987; 50 U.S.C.A. 781 (1950)
>
> "As a result of evidence introduced before various committees of the Senate and House of Representatives, the Congress finds that —

(1) there exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of world-wide Communist organization . . . .

(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement."

The general nature of the Party has been fully discussed to like effect in the opinions of this court and of its Justices.

See e. g. *American Communications Assoc. v. Douds* 339 U. S. 382, especially Mr. Justice Jackson's opinion at pp. 424-434

Dennis v. U. S., 341 U. S. 494

In the light of the foregoing we submit that adverse inferences as to relevant moral character are permissible from the fact of active and knowing Communist Party membership. So far as we are aware, every court that has passed upon the point has regarded membership in the Communist Party as logically relevant to fitness to practice as a lawyer.

Re Konigsberg, (Calif. S.Ct. 1955)
(without opinion)

Re Anastaplo, 3 Ill (2), 471; 121 N. E. (2) 826; cert. den. 348 U.S. 946; reh. den. 349 U. S. 908

Martin v. Law Soc. of B.C., 3 Dom L. R. (1950) 173

See also

Sheiner v. State, (Fla.) 82 S. (2) 657
(not officially reported)

Nor does the fact, if it be a fact, that the petitioner's membership in or allegiance to the Communist Party has terminated deprive the evidence of membership of logical and constitutional relevance. It is a rule of law as well as sound reasoning that past conduct is relevant to present character.

Garner v. Board of Public Works, 341 U.S.716, 720

"Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

The petitioner contends that there is no logical relevance between past Party membership and present moral fitness to practice law. (Brief, 38-40) He bases his contention in part on a claimed parallelism between Party membership in this case and adherence to the Southern cause in *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, referring to the claimed disqualification of the petitioners in those cases as "draft dodging" and "sympathy with revolutionists" in order to support his analogy.

The claimed disqualifying conduct in the *Cummings*

and *Garland* cases had no relationship whatever to the petitioners' fitness for their occupations as this Court held. Not even in the bitterness of the Reconstruction was it claimed that adherence to the Southern cause was morally reprehensible in the sense that adherence to Communism is now recognized to be reprehensible. The issue of moral character implicit in the techniques of modern Communism are in no measure comparable to the issues presented in the *Cummings* and *Garland* cases.

The petitioner makes the further points that even though morally objectionable, his participation in Communism was idealistically inspired, lawful, an exercise of the right of free association, and occurred at a time so remote that it should be disregarded. He suggests that his participation was not shown to be "knowing" or with *scienter* because of the possibility that he may himself have been a rank-and-file dupe of Communism and not one of the inner circle of leaders of the conspiracy.

Here we are dealing with factual questions on an issue as to which the petitioner had both the burden of proof and the sole means of knowledge. Neither respondent Board nor the New Mexico Court could, we submit, properly be required to assume petitioner's good motives in having joined the Party. Nor is there proof of compelling persuasion that he had remained a rank-and-file member or had not entered the "esoteric party" referred to in the petitioner's Brief. The Board and the Court below, we submit, were not bound to accept petitioner's self-serving suggestions as to his motivation nor exculpatory explanations of his participation if, indeed, there be any on a fair appraisal of the record. Surely the Due Process Clause does not thus circumscribe the authority of a State's Board of Bar Examiners nor of a State Supreme Court.

Nor can the claimed fact that the disloyal and mendacious nature of Communist activity had not been determined and declared by Congress and the courts prior to the date when the petitioner claims to have left the Party deprive his participation of logical relevance. To begin with, it is not a reasonable interpretation of *Schneiderman v U. S.* 320 U. S. 118 (1943) to assert, as petitioner does, that in that case "the Government had therein failed to prove the existence of any nefarious aims of the Communist Party" (Brief 23) or that the Party was there "tested in Court and not found wanting." (Brief, 40) In that case, membership in the Party was held by a majority of this Court not to warrant denaturalization. That decision affords no reasonable basis for an assertation that in 1943 and prior thereto the nature of the Communist Party was not a matter of general knowledge. But whether then known or later discovered makes no rational difference to the petitioner's case. This is not a proceeding to impose a punishment for an offence, not unlawful when committed, but an inquiry into the existence of good moral character.

> *In re Rouss*, 221 N. Y. 81; 116 N. E. 782
>
> "To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character like an examination into learning is merely a test of fitness."

Bar examiners and Courts have never been limited to the consideration of criminal conduct in inquiring into an applicant's good moral character.

See e. g.

Ex parte Keeley, (Ore) 189 P. 885
(not officially reported)

Re Bowers, 138 Tenn. 662; 200 S. W. 821

Moreover, there can be no real doubt of the validity of a finding of *scienter* in this case. This is not a case like *Wieman v. Updegraff*, 344 U. S. 183, in which knowing and unknowing participation in proscribed affiliates of the Communist Party were alike condemned. There would appear to be no sensible reason why the principle of that case should be applied at all to membership in the Communist Party itself as distinguished from its affiliates. Unwitting membership in the Communist Party seems to us, as to Chief Justice Stone, preposterous. *Schneiderman v. U. S.* 320 U. S. 118, 195-196. Here, however, the evidence clearly supports the determination of the respondent Board and the Court below that the petitioner had *knowingly* given his loyalties to the Communist Party (R. 124)

Finally, the determination of the New Mexico Court does not amount, as petitioner claims, to an automatic and permanent disqualification from the Bar of all former Communists. The fact of former Party membership and activity was given weight along with the other evidence contra-indicating good moral character. In the light of this evidence and other evidence, the Court after careful review found itself unconvinced of requisite moral character. We are not dealing here with a prohibitory statute or rule of general application; but with a finding of the Supreme Court of a sovereign State on an issue peculiarly within its province and within a judicial jurisdiction of venerable antiquity. Nothing in the Due Process Clause, we submit, limits the power of the New Mexico court to make the challenged inference nor required it to make a contrary one in the present case.

D. The evidence of use of aliases warranted adverse inferences on the issue of petitioner's good moral character.

Both the respondent Board and the Supreme Court of New Mexico relied in part on the petitioner's use of aliases in arriving at their determination that they were not satisfied of his good moral character. The petitioner contends that the evidence in this case touching the use of assumed names does not permit a rational adverse inference on this issue.

To recapitulate the evidence, the petitioner began using the name Rudolph De Caprio in the fall of 1933 when he was employed in a pocketbook factory in Middletown, New York (R. 100) or in Gloversville, New York. (R. 19, 20) His purpose was either to be able the better to influence Italian workers to join a union (R. 100, 34) or solely to gain employment by passing himself off as Italian, (R. 19, 20) or he had both these purposes. (R. 34, 35) After the union was organized, he returned to New York City and resumed his true name. (R. 100) In February 1934 to February 1937 petitioner lived at several California points (R. 101, 102) and during the entire period of residence in California used the name Rudolph De Caprio. (R. 100) He states that he did this solely to obtain work in a shipyard where he had never seen a Jewish person employed. (R. 20, 21)

In the Communist Party, the petitioner used the names Rudy De Caprio or Joe Fliori, he does not recall which. His active membership in the Communist Party continued until 1940. (R. 24, 26) When arrested while in California in 1934, he used the name Joe Fliori or Joe Fliari. (R. 22, 100) This name or names was assumed just to give

to the police (R. 22) and he derived no monetary benefit as a result of that name. (R. 22)

The foregoing conduct is characterized by the petitioner as "the exercise in the remote past of the ancient common law right to use an alias." He contends that the Due Process Clause prevents adverse inferences from it. He cites a number of cases recognizing the validity of voluntary changes of name and relies upon the fact that many historical persons have changed their names. Paradoxically, while now making the contention that the use of aliases is lawful and not discreditable, he contends that there is nothing to show that he presently condones the use of aliases. (Brief, 43 fn.) At the same time, he has testified that he never intends again to use an alias. (R. 38)

The respondent Board and the Court appear to have drawn adverse inferences as to moral character from this evidence and not to have accepted the exculpatory (and inconsistent) explanation offered by the petitioner. This seems to us completely rational. We believe that any reasonable person would draw adverse inferences from a personal history of concealment of identity as shown in the record. Moreover, the use of an alias or false name in the context of the present case throws some light on both the nature of his Communist membership and on the possible innocence of his arrests which were also matters for consideration by the Board and the New Mexico court. We believe that an intelligent layman would be startled by a contention that an adverse inference as to moral character could not, by reason of the Due Process Clause, be made by a State from this evidence.

The fact that historical figures have changed their names or that writers and actors and other persons have

adopted and changed their professional names has nothing to do with the logical relevance of this evidence. The common law right to change one's name may properly be exercised for a *lawful* purpose. (*Re Zanger*, 266 N. Y. 165; 194 N. E. 72) and without intention to deceive (65 C. J. S. 19). On the other hand, an accused's assumption of a false name is universally considered to be evidence of consciousness of guilt and thus of guilt itself.

2 Wigmore on Evidence (3ed 1940) s. 276, p. 111

The cases are legion that in criminal cases the adoption or giving of an assumed name is always relevant to show such consciousness of guilt.

See e. g.

People v. Cox, 29 Cal. App. 419; 155 P. 1010

State v. Davis, 6 Ida. 159; 53 P. 678

State v. Stewart, 65 Kan. 371; 69 P. 335

Halfyard v. People, 77 Colo. 390; 237 P. 151

State v. LaPlant, 149 Or. 615; 42 P. (2) 158

State v. Miller, 164 Wash. 441; 2 P. (2) 738

The giving of a false name by the petitioner on the occasion of his arrests would seem clearly to fall within the ground of relevancy illustrated by the foregoing cases. The same principle would seem logically operative on his use of a false name in the Communist party. We submit that a parallel basis of relevancy in a civil action would make the same type of evidence relevant in such case. The very basis of relevancy is that rational relevant inferences can be drawn from evidence of this type. As a matter of common sense no reasonable man would make a different inference.

The petitioner contends that there was no deception, or pardonable deception, in all the occasions of his use of an alias and that the use of aliases was too remote in time to be a valid basis for inference as to present character. These are factual matters on which the decision of the respondent Board and the Court below should be controlling. They were not bound to accept his exculpatory explanations any more than a jury would be. *People v. Cox*, 29 Cal. App. 419; 155 P. 1010, 1011. Petitioner's assertion that giving a false name to the police while he was in their custody could not have materially misled them (Brief, 46) is palpably absurd. His lack of a candid explanation of his use of false names in the Communist Party and his claim that he could not remember which name or names he used during his six years of Party membership reinforce a doubt as to his present character rationally engendered by the record of his past conduct. It was exactly the kind of testimonial vagueness and inadequacy that would impress any trier of fact unfavorably.

The Court below did not deny due process in giving probative value to this evidence adverse to the petitioner.

E. The record of arrests warranted adverse inferences on the issue of petitioner's good moral character.

The New Mexico court in connection with its review of the respondent Board's action drew from the petitioner's evidence concerning his arrests some conclusions in support of its general conclusion that it was not convinced of petitioner's good moral character. It did not announce a rule of general or specific application that mere arrests would warrant exclusion from the practice of law as the petitioner appears to contend. (Brief, 47) (Cf. *Slochower v. Bd. of Ed. of N. Y.*, 350 U. S. 551) Without being repetitious, it

seems necessary to point out once more that the inquiry before the respondent Board and the New Mexico Court related to the petitioner's good moral character. Is it due process in the course of such an investigation to consider and weigh evidence touching arrests like that shown in the record here? This rather than the propriety of a rule of automatic disqualification for the mere fact of an arrest or arrests is the question here. Nor does the question relate to the adequacy of the circumstances of an arrest or the arrests to warrant a criminal conviction.

Logically, it would seem that such inquiry is on solid ground in any investigation of moral character. Applicants for any public or private employment or office are asked questions of this kind as a matter of daily routine and their answers to questions touching arrests are weighed and considered in every personnel office in the country. (See *Garner v. Bd. of Public Works*, 341 U. S. 716, 720.) May not a State make similar inquiry and exercise similar judgment in the process of ensuring itself a Bar of good moral character? The answer seems to us obvious.

The record indicates that petitioner was arrested in 1934 "on a number of occasions" (R. 100) or "on several occasions" (R. 104) or on "two" occasions (R. 21) in San Pedro during the maritime strikes in California. He was booked for "suspicion of criminal syndicalism" under the name Joe Fliari (Fliori?) although he was at that time normally using the name Rudolph de Caprio. (R. 104, 100) The petitioner believed that the crime of criminal syndicalism consisted of the commission of an act to overthrow or subvert the State government. (R. 21, 22) The petitioner gave no explanation whatever of the specific conduct which led up to his arrests on any of these occasions. His actions in connection with this arrest were governed largely

by instructions he had received from the Communist Party. (R. 25) He had learned from the files of the San Pedro newspaper that there were approximately 2-3000 people arrested in the course of about 66 days approximately, over 200 on a charge of suspicion of criminal syndicalism. (R. 21)

The petitioner was arrested in 1940 under an indictment charging violation of the Neutrality Act. 18 U.S.C.A. s. 959(a) (R. 22, 104) He had been engaged in recruiting volunteers for the Loyalist side in the Spanish revolution. (R. 23, 35) The charges were nol-prossed. (R. 23) The petitioner stated that he did not know his recruiting activity was unlawful. (R. 23, 24) His activity in recruiting for the Abraham Lincoln Brigade had been part of his work for the Communist Party (R. 35) and in connection with this arrest also his actions were governed by instructions he had received from the Party. (R. 25)

The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (R. 105, 24)

The evidence therefore does not show three arrests, as petitioner stated in his Petition (Petition 12) or four arrests as he states in his Brief (Brief, 47) but an unascertained number of arrests. Moreover, the evidence does not fairly indicate that any but the last of these was erroneous or in innocent circumstances. The conduct that led up to the arrests for criminal syndicalism is completely unexplained except that it is clear that whatever his actions at those times they were governed by instructions from the Communist Party. We are asked to assume that his conduct was innocent and that he was wrongfully arrested under a statute of a sister state that is, in effect, dismissed as neg-

ligible. The nature and extent of the conduct leading up to his indictment under the Neutrality Act is clearer on the record. The petitioner appears to have recruited personnel for the Abraham Lincoln Brigade as a part of his Communist party activity. The suggested inference is that this also was innocent or negligible. We believe it is a fair inference from the record that petitioner presently regards all of these arrests as venial or even laudable.

We respectfully submit that any rational finder of fact would draw adverse inferences as to moral character from the evidence touching the arrests. This, not only as an inference from past conduct but also from present attitude. The respondent Board and the Supreme Court of New Mexico did so. The making of such inference was within their power and not a violation of the Due Process Clause.

F. Discrepancies and omissions on the petitioner's part warrant an adverse inference on the issue of good moral character.

There were discrepancies and omissions in the application and evidence submitted by the petitioner which were noted by the Supreme Court of New Mexico in reaching its decision. (R. 113, 119, 120) These included the varying explanations of the purposes and circumstances in which he used an alias recited above (*supra. p.* 29) They further included the Court's examination of the personal history information included in his application, (R. 118-119) which caused the Court to comment as follows: (R. 119):

> "The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New

> York. Over that period he has given only one personal name of an employer, for whom he also gave a completed street address in South Bend, Indiana, and only the street name for the location of the two Workers Alliances he was connected with in Detroit. This adds up to slightly more than a complete blank."

It is submitted that it is not irrational to attach significance to the discrepancies noted and to draw inferences as to present moral character adverse to the petitioner from them. They are, moreover, relevant to an evaluation of the innocence or non-innocence of the petitioner's Party activity, use of aliases or arrests. The omissions likewise are of rational relevance and significance. The absence of specific data covering this period of the petitioner's adult life is a matter that the finder of fact could quite properly and rationally consider.

G. Conclusion

We have here the review of a finding of fact made by a Court in the proceeding under a traditional jurisdiction of courts of the common law "well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of . . . ." the administration of justice. (*Barsky v. Board of Regents*, 347 U. S. 442, 453.) The factual issue for determination was conviction of good moral character and on this issue under the law of New Mexico the petitioner had the burden of persuasion. *Schware v. Board of Bar Examiners*, 60 N. M. 304; 291 P.(2) 607. The duly constituted Board of Bar Examiners of the State of New Mexico has found against such conviction and that petitioner "has failed to satisfy the Board as to the requisite moral char-

acter for admission to the Bar of New Mexico." (R. 8) The Bar Examiners consist of five distinguished members of the bar of New Mexico (R. 125) selected by the governing board of its bar and approved by its Supreme Court for this responsible position. (N.M.S. (1953 Comp.) § 18-1-8) There is nothing in the record to indicate a capricious, irrational or prejudiced decision on their part. Under general principles, there is a strong presumption to the opposite effect. The respondent Board understands and cherishes the due process of law and submits that it has not denied it in this cause.

The determination of the Board has been reviewed fully as a matter of original jurisdiction by the Supreme Court of New Mexico. The Court found itself also unconvinced of the petitioner's good moral character by his showing. In doing so, they relied on logical and rational inference from relevant facts. They did not announce a rule of automatic exclusion of general or special application on any of the grounds which petitioner has argued. The decision does not offend the Due Process Clause.

POINT II

It was not a denial of due process of law to refuse to disclose to petitioner confidential information concerning him which was not a basis of the decision of the respondent Board nor of the New Mexico Supreme Court.

A. Introduction

This Point is responsive to Point IV of petitioner's Brief. Petitioner there contends that because the respondent Board obtained confidential information concerning him which was not disclosed to him, he has been prejudiced in his constitutional rights. The facts relevant to this Point are these.

In the course of its examination of the qualifications of applicants for admission to the Bar of New Mexico the respondent Board makes written inquiries concerning each applicant. (R. 105) Permission to make these inquiries is required of each applicant upon the explicit understanding that the applicant will not be entitled to receive a copy of any report or know its contents (R. 105) Inquiries are made and answers obtained upon the express assurance given to informants that the respondent will hold them in strict confidence. (R. 92, par. 10) This procedure was followed in the present case.[1]

At his second hearing before the respondent Board on July 16, 1954, petitioner's counsel asked to be given any data, and the names of any witnesses, which had been obtained against the petitioner. (R. 89) He was advised

[1] We are informed that this procedure in New Mexico is substantially identical with that in many, and perhaps all, states.

that an investigation had been made of a confidential nature and with his consent (R. 9, 10); and that this confidential information was not available for his inspection. (R. 9, 10, 11) He was further told that such confidential information is only used to check applicants' information and that the Board never has done anything to the detriment of an applicant on the basis of such hearsay information. (R. 10) The Board also told him that he could not assume there was nothing adverse in the confidential information, (R. 11) but that the original decision not to permit him to take the bar examination was not motivated in any way by such information. (R. 9, 11) In its *sworn* pleading, the respondent Board further certified that it does not reach a decision upon application for admission to the State Bar on the basis of such confidential information and did not do so in the case of the petitioner (R. 92, par. 10 and see footnote *supra* p. 6); further, that the bases of decision of the Board in this case are not to be found in such confidential information, but that such decision is based upon facts disclosed by the petitioner himself. (R. 92, par 10)

In the Supreme Court of New Mexico, where the petitioner's cause was reviewed as a matter of original jurisdiction, none of the judges who joined in the decision of the Court looked at this information, although the single judge who dissented appears to have done so. (R. 110, 111)

B. Refusal to disclose confidential information not relied upon in decision was not a denial of due process.

The constitutional rights of the Petitioner were not violated upon the foregoing facts. These rights require that no person be deprived of rights or liberties on the basis of evidence not subject to the constitutional and due process

requirements of confrontation and cross-examination. The respondent Board appears to have had knowledge and appreciation of these rights in their application to the specific fact situation under study here. (R. 10-12) It is undisputed here, as it was at the Board hearing and in the Court below (R. 110-111), that a decision based upon this type of hearsay evidence would violate due process. (*Peters v. Hobby*, 349 U. S. 331, esp. concurring opinion of Mr. Justice Douglas, pp. 351-353) This is not the situation presented on the present facts.

We have, on the contrary a decision clearly *not* based upon such improper evidence. It affirmatively appears that neither the Board nor the Supreme Court of New Mexico relied upon the challenged evidence at all. There is not the slightest reason for doubting the sworn statement of the respondent Board, or the judicial avowal of the Supreme Court of New Mexico that the confidential information was not a basis of decision; nor to attempt to construe either of these as meaning anything less than that the challenged evidence was given no effect whatever in the decisive process. We know of no decision, and none has been cited, which requires a disclosure in these circumstances. To require disclosure will avail nothing and would result in the respondent Board's violating its specific commitment to informants.

The decision of this Court and the dissent of Mr. Justice Frankfurter in the *Barsky* case (347 U. S. 442) alike support the respondent on this issue. There the Court held that the decision of the Board of Regents of New York could not be found to violate due process by reason of the receipt of certain irrelevant evidence, there being nothing sufficient to sustain the conclusion that the Board or its committees had relied upon such evidence. Mr. Justice

Frankfurter considered that, where it was uncertain as to whether or not reliance had been placed on the improper evidence, a violation of due process existed. In the present case, it is a matter of certainty that neither the respondent Board nor the New Mexico Supreme Court relied upon the challenged evidence.

It follows that there was not a denial of due process in refusing to permit the petitioner to examine the confidential information. The right of confrontation or cross-examination does not extend to evidence not considered by the finders of fact in reaching their decision.

CONCLUSION

This court should affirm the judgment of the Supreme Court of New Mexico.

Respectfully submitted,

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APPENDIX

Constitutional Provision

United States Constitution, Amendment XIV, Section 1, Clause 2: ". . . nor shall any State deprive any person of . . . . property without due process of law."

Statutory Provisions

N. M. S. (1953 Comp.) § 18-1-8: "With the advice and approval of the Supreme Court, the board [of commissioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval by the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners . . . . ." (Adopted as N.M. Sess. L. 1925, c. 100, § 7, amended N. M. Sess. L. 1949, c. 22 § 1. Now found in N.M.S. (1953 Comp.) Vol. 4, pp. 84-85).

Neutrality Act of 1816. 18 U.S.C. § 959(a): "Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Duties of Attorneys. (N.M.S. (1953 Comp.) § 18-1-9): "It is the duty of an attorney at law:

(1) To support the Constitution and the laws of the United States and of this state;

(2) To maintain the respect due to courts of justice and judicial officers;

(3) To counsel or maintain no other action, proceeding or defense than those which appear to him legal and just, excepting the defense of a person charged with a public offense;

(4) To employ for the purpose of maintaining causes confided to him such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

(5) To maintain inviolate the confidence and preserve the secrets of his client;

(6)To abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged;

(7) Not to encourage either the commencement or continuation of an action or proceeding from any corrupt motive of passion or interest;

(8) Never to reject for any consideration personal to himself the cause of the defenseless or oppressed."

Communist Control Act. 60 Stat. 775, 50 U.S.C.A. 841

"The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Gov-

ernment of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties but denying to all others the liberties guaranteed by the Constitution. . . . . ."

Internal Security Act. 64 Stat. 987, 50 U.S.C.A. 781

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that —

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

* * * * * * * * *

(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

* * * * * * * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, the overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

RULES

Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4, pp. 85-89):

RULE I. *Qualifications*: "(1) * * * An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character * * *."

RULE III: *Examinations*: "(7) * * * Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when * * satisfied of his good moral character."